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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WILLIAM JACKSON, Plaintiff, Appellant and Cross-Respondent, v. UNITED PARCEL SERVICE, INC., Defendant, Respondent and Cross-Appellant.	A098224 (San Francisco County Super. Ct. No. 313454)

William B. Jackson appeals the grant of his employer's motions for nonsuit on Jackson's claims for defamation and breach of the covenant of good faith and fair dealing. Respondent United Parcel Service (UPS) has cross-appealed, arguing Jackson failed to prove a violation of the California Family Rights Act (CFRA). We affirm the judgment for UPS, and reverse the judgment for Jackson on the CFRA claim.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1999, Jackson, then a manager in charge of the UPS Menlo Park division, went out on disability leave.[1] A few days later, UPS notified him that he might be eligible for up to 12 weeks of unpaid leave under the Family Medical Leave Act

[1] Jackson began working for UPS in 1979. He held a number of different positions and became the Menlo Park division manager in July 1999.

(FMLA), and that days off due to disability would be charged against his available FMLA benefits.[2]

In July 2000, while still on leave, Jackson filed suit against UPS, alleging breach of contract and the covenant of good faith and fair dealing, as well as intentional and negligent infliction of emotional distress.[3] In September 2000, Jackson's short-term disability benefits ended after his doctor notified the plan administrator he could return to work as a manager. The next month, in response to an inquiry from Jackson, UPS notified him that four of his five weeks of accrued vacation would be applied to his leave, in accordance with existing UPS policy.

In November 2000, after more than a year on leave, Jackson returned to work.[4] A new manager had been assigned to the Menlo Park division during Jackson's absence, and Jackson was assigned to work with the preload manager on nightshift in the San Francisco division.[5] During that time, UPS managers attended a labor panel hearing with the Teamsters Union in Sacramento to address employee grievances, including grievances that had arisen in Menlo Park during Jackson's tenure as division manager. During a break in the proceedings, a friend of Jackson's named Michael Dillon overheard Ralph Goetz, the Northwest regional manager, tell fellow manager Frank Cademarti that Jackson "couldn't run the smallest division in the country." Benn Camicia was another

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2 The FMLA is the federal corollary of the CFRA, and is codified at 29 U.S.C. section 2601 et seq.

3 The action was filed with two co-plaintiffs, Raymond Mazon and Stan Predki, who included additional claims for age discrimination, retaliation, and assault. UPS and district manager Ernie Brown were named as defendants. In February 2001, an amended complaint was filed adding a violation of plaintiffs' CFRA rights and defamation. The trial court later granted Brown's motion for summary judgment, and the ensuing dismissal of Brown as a defendant is the subject of a separate appeal pending before this court in *Jackson v. Brown*, No. A098047. In September 2001, the court ordered that plaintiffs' claims against UPS be tried separately. In October 2001, plaintiffs filed a second amended complaint clarifying the factual basis for their retaliation claim.

4 Under the corporate disability program, UPS could have terminated Jackson's employment when he did not return to work within 12 months. Instead, UPS had granted him additional unpaid time off.

5 Although the job was a lower level position, UPS maintained Jackson's salary and benefits at his previous level. Jackson was unhappy with the new assignment, however, because he was working with a lower level manager who had less experience than he did.

UPS manager due to be deposed in plaintiffs' suit. Dillon heard Goetz say that he had told Brown to remind Camicia "where his loyalties lie." Goetz himself had been deposed a few days earlier. When he was asked how it had gone, Dillon overheard Goetz tell Cademarti that "the three of those guys—they are just feeding off of each other." Dillon reported what he had heard to Jackson. At trial, Goetz admitted making the first statement, but denied the latter two.

In January 2001, less than three months after returning to work, Jackson again went out on stress leave. He remained on leave at the time of trial in October 2001. Jackson sought to persuade the jury that UPS had deprived him of earned compensation, violated his CFRA rights, defamed him, attempted in bad faith to force him out of his position, and retaliated against him for asserting his CFRA rights and joining in the original lawsuit with Mazon and Predki. During trial, the court granted UPS' motion for nonsuit on the claims for breach of the covenant and negligent infliction of emotional distress.[6]

The jury found for UPS on Jackson's claims for breach of contract, retaliation, and intentional infliction of emotional distress. The jury also rejected Jackson's claim for punitive damages. It awarded Jackson $90,000 for defamation, and $3,250 for the CFRA claim. Following the verdict, the trial court granted UPS's pending motions for nonsuit and directed verdict on the defamation claim, but denied its motion for JNOV on the CFRA claim. The trial court also denied Jackson costs and attorney fees on the CFRA award. Jackson timely appealed. UPS cross-appealed the judgment for Jackson on the CFRA claim.

DISCUSSION

The nonsuit was properly granted on the defamation claim. A false statement of fact is an essential element in a cause of action for defamation. (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181; *Jensen v. Hewlett-Packard*

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6 With regard to the motion for nonsuit as to the defamation claim, the court observed: "I have to say that [] my present plan, even though this is an extremely thin allegation, is to let the jury handle this issue."

Co. (1993) 14 Cal.App.4th 958, 970 (*Jensen*); *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1606-1607 (*Kahn*); *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309 (*Gill*).) A statement of opinion is not actionable, unless it implies the existence of undisclosed defamatory facts. "The dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837, quoting *Kahn*, *supra*, 232 Cal.App.3d at p. 1607 and *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724 (*Moyer*).)

The issue of whether a communication constitutes a statement of fact or opinion is a question of law to be decided by the court. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 (*Baker*); *Kahn*, *supra*, 232 Cal.App.3d at p. 1608.) The court must evaluate the totality of the circumstances, examining the language of the statement itself, as well as the context in which it was made. (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578 (*Campanelli*); *Jensen*, *supra*, 14 Cal.App.4th at p. 970.) Courts have regarded broad and unfocused comments, or those that include the expression of subjective judgments, to be statements of opinion rather than fact. (See, e.g., *Campanelli*, *supra*, 44 Cal.App.4th at p. 579 [statements to the effect that plaintiff coach had inflicted psychological damage on his players by subjecting them to tirades constituted nonactionable opinion]; *Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 191 [calling plaintiff "a crook" constituted protected statement of opinion]; *Moyer*, *supra*, 225 Cal.App.3d at p. 725 [no cause of action for statements that plaintiff was "the worst teacher" at the high school].)

Goetz's comment, that Jackson couldn't run the smallest division in the country, was both broad and subjective. Further, Goetz did not suggest Jackson lacked honesty or integrity, but conveyed his opinion that Jackson could not perform his duties competently. Such a protected statement of opinion cannot give rise to liability for defamation. (*Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1554 [statements regarding plaintiff's unsuitability for a teaching position not actionable]; *Gould v.*

Maryland Sound Industries, Inc. (1995) 31 Cal.App.4th 1137, 1154 [supervisor's accusation of poor performance clearly a statement of opinion].)

The cases upon which Jackson relies are distinguishable. In *Kahn*, *supra*, the court noted that a general assertion plaintiff was incompetent "approach[ed] the outer limits of vagueness and subjectivity." (232 Cal.App.3d at p. 1609.) In that case, however, defendant's letter to the supervisor of plaintiff social worker contained detailed statements asserting particular acts of incompetence, such as removing a specific child from loving foster parents and sending her to Alaska in opposition to defendant's professional recommendations. (*Id.* at pp. 1608-1609.) Viewed in context, the *Kahn* court concluded, the letter might reasonably be understood to imply specific factual assertions that could give rise to liability. (*Id*. at p. 1609.) Similarly, in *Gill*, *supra*, a statement that plaintiff physician was an incompetent surgeon in need of further training, made in the context of a hospital hearing to determine his right to retain full surgical privileges, was held to imply knowledge of supporting facts regarding his surgical technique and medical judgment that were susceptible of being proved true or false. (227 Cal.App.3d at p. 1309.)

Goetz's statement, by contrast, lacked such specific or implied factual content, consisting instead of a general subjective complaint about Jackson's job performance. The statement was also made in a less formal context, as an aside to a fellow manager during a break in a labor grievance meeting.[7] (See *Campanelli*, *supra*, 44 Cal.App.4th at

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[7] The trial court noted that "the remarks attributed to Goetz came after a meeting with labor officials that addressed grievances the local had with the employer. Specifically, the testimony at trial suggested that just before the utterance, the union leaders had pointed out that management was performing tasks covered by the union contract. This behavior amounted to a potential violation of the collective bargaining agreement." The trial court concluded: "Viewed contextually, the remarks by Goetz must be considered expressions of opinion following a 'heated labor dispute.' [Referring to *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601.]" Goetz himself testified: "[W]e were having a discussion concerning the supervisors working grievances on the docket. There were 5- or 600 grievances on the docket. And the question was asked is: How come we have so many supervisors working grievances from the north division, Sunnyvale, Menlo Park? [¶] And I went through and made the statement that, in my opinion, based on Bart's incompetencies, he had a difficult time running the smallest division in the country. He had staffing issues; he was short people; and all the supervisors' working grievances were coming because of that."

p. 579.) The actual wording of Goetz's statement further supports the conclusion that it constituted an expression of opinion, as the reference to Jackson's inability to run "the smallest division in the country" suggests the type of rhetorical hyperbole incapable of being proved true or false.[8] (See *Baker*, *supra*, 42 Cal.3d at pp. 267-268 [use of hyperbole and sarcasm indicated statement was one of opinion]; *Moyer*, *supra*, 225 Cal.App.3d at p. 726 [epithet "babbler" used not literally "but as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style"]; *Fletcher*, *supra*, 216 Cal.App.3d at p. 191 [description of plaintiff as "a crook" did not charge him with a specific crime, but instead constituted "merely rhetorical and hyperbolic language"]; *Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1440 [attorney's use of colorful expressions such as "dishonest" and "one of the worst judges in the United States" conveyed "nothing more substantive than [attorney's] contempt for [the judge in question]; contrast *Gould*, *supra*, 31 Cal.App.4th at p. 1154 [accusation that employee had made a $100,000 bidding error susceptible to proof by reference to concrete data].)

Nor was Goetz's remark that Jackson and his co-plaintiffs were "feeding off each other" a factual statement capable of being proved true or false. Instead, it was simply a descriptive phrase reflecting "nothing more than 'the predictable opinion' of one side to [a] lawsuit."[9] (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1403.) Thus even assuming, arguendo, that Goetz's comments were objectively unjustified or made in bad

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8 Indeed, Jackson's attempt in his reply brief to "prove" his competence by reference to the testimony of various witnesses only emphasizes the impossibility of objectively testing Goetz's statement. A difference of opinion about the quality of Jackson's work was insufficient to support his claim for defamation. Jackson also makes much of Goetz's remark during his deposition that he had attributed to Jackson responsibility for several hundred pending grievances. First, the record is less than clear on whether Goetz actually made such a statement. Further, there was no evidence, however, that such a statement, if made, was actually heard by anyone else, and Goetz himself testified at trial that he had complained about the number of grievances, but had not attributed them to Jackson. (See *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 ["Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made."])

9 The trial court's failure to specifically discuss this particular comment was therefore of no consequence.

faith, they could not support a defamation claim because they were statements of opinion, not false statements of fact.[10] (*Campanelli*, *supra*, 44 Cal.App.4th at p. 578, citing *Jensen*, *supra*, 14 Cal.App.4th at p. 971.)

Nonsuit was also properly granted on the independent ground that Goetz's statements were privileged. "Under the 'common-interest privilege,' codified in California in Civil Code section 47, subdivision (c) . . . , a defendant who makes a statement to others on a matter of common interest is immunized from liability for defamation so long as the statement is made 'without malice.' " (*Lundquist v. Reusser* (1974) 7 Cal.4th 1193, 1196 (fn. omitted) (*Lundquist*).)[11] The trial court concluded that the remarks in question here "were [made] to a limited audience, regarding conduct by a member of the management team that amounted to [a] grievance under the union contract, following the hearing on the violation itself. Significantly, the incident[] involving the plaintiff was similar to grievances that had cost defendant corporation substantial fines in the past." The trial court noted that Goetz's remarks "were not addressed to the public at large, but were mentioned to a management person who was representing the defendant at the labor grievance hearing." Dillon, who overheard part of the conversation, was also a manager. The court concluded these managers "presumably shared a common interest in the welfare of the corporation, and a desire specifically to avoid . . . offending . . . the collective bargaining agreement with the Teamsters."

Jackson also failed to sustain his burden of proving the malice required to negate the statutory privilege. (See *Lundquist*, *supra*, 7 Cal.4th at pp. 1196-1197.) "For purposes of this statutory privilege, malice has been defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person."

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10 This conclusion follows from the nature of Goetz's overall comments, viewed in context, whether or not they were prefaced by the phrase "in my opinion." While Dillon did not report overhearing those additional words, he was not asked whether he had done so.

11 All further statutory references are to the Civil Code unless otherwise indicated. Section 47(c) defines as privileged a publication made: "In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communciation to be innocent, or (3) who is requested by the person interested to give the information."

(*Lundquist*, *supra*, 7 Cal.4th at p. 1204 (citations and quote marks omitted).) Section 48 provides that, with respect to statements falling within section 47, subdivision (c), however, "malice is not inferred from the communication."

The trial court concluded "the context of the utterance as well as the alleged defamatory remarks does not demonstrate malice as a matter of law." On appeal, Jackson urges that Goetz's comments reflected hostility to Jackson's pending lawsuit, rather than an attempt to save the company money.[12] Jackson offered no substantial evidence, however, that Goetz had any personal animosity towards him independent of his concern with company operations, and thus failed to show that Goetz's remarks were motivated by the malice required to negate the statutory common-interest privilege.[13] Under these circumstances, Goetz's criticism of Jackson's job performance was simply not the stuff of which a valid defamation claim could be made.[14] The motion for nonsuit on Jackson's defamation claim was properly granted.

Next, Jackson contends the trial court erred in granting nonsuit on his claim for breach of the covenant of good faith and fair dealing. He contends that Brown and his subordinate, Sal Mignano, took actions in violation of UPS's written policies to drive out division managers, including appellant, and to deprive appellant of earned compensation in the form of raises, stock options, etc. The jury rejected Jackson's related breach of

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12 Jackson claims that "Goetz's hostility towards appellant because of the lawsuit is supported by the evidence," without explaining which evidence he has in mind. Such speculative inferences are insufficient to establish the requisite malice. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 931.) We also note that even assuming arguendo that the evidence was sufficient to demonstrate such hostility as a motivation for Goetz's statements, insofar as Jackson's lawsuit was brought against the company, such a motive would appear not inconsistent with the desire to save the company money.

13 Goetz's comments at a meeting of managers more than two years earlier, when he invited them collectively to resign, had been critical of the performance of the entire Northern California management staff, and were not directed at Jackson personally. Nor did Goetz's alleged request to District Manager Ernie Brown to remind prospective witness Ben Camicia "where his loyalties lie," or Goetz's alleged lack of credibility at trial, demonstrate the requisite malice toward Jackson.

14 Jackson also claims the privilege does not apply here because at trial "Goetz denied making two of the statements, and offered 'sanitized' versions of the third." The case on which he relies, however, held only that when a defendant testifies that he did not believe the allegedly defamatory statement to be true, he may not assert the privilege. (*Russell v. Geis* (1967) 251 Cal.App.2d 560, 566-567.)

contract claims, however, with the exception of the CFRA claim, which is discussed below.[15] In the absence of a separate factual basis for the breach of covenant claim, the trial court properly relied on *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 in granting nonsuit.[16] To the extent Jackson's implied covenant cause of action sought to impose on UPS terms and conditions *beyond* those to which the parties had actually agreed, the claim was invalid. (See *id*. at pp. 352; see also *Los Angeles Equestrian Center, Inc. v. City of Los Angeles* (1993) 17 Cal.App.4th 432, 447, quoting *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032 ["the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract"].)

UPS has cross-appealed, contending the $3,250 judgment on Jackson's CFRA claim should be reversed because he failed to prove a violation of the statute. The argument has merit. The CFRA grants eligible employees the right to take up to 12 weeks each year for family care and medical leave, with a guarantee of employment in the same or a comparable position upon their return. (Gov. Code, § 12945.2, subd. (a).)[17] The statute also protects the employee from retaliation for exercise of his or her right to such leave. (§ 12945.2, subd. (*l*).) The employer is generally not required to pay an employee during leave taken pursuant to the Act, but may require the employee to substitute his or her accrued vacation leave and/or sick leave, if the employee takes a leave because of his or her own serious health condition. (§ 12945.2, subds. (d), (e).)

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15 Jackson's reliance on wrongful termination cases that were decided by summary judgment, and are also otherwise factually distinguishable, is therefore misplaced. We also note that Jackson does not claim to have been terminated by UPS, and evidently remained employed by the company at the time of trial.

16 We note that the great majority of alleged additional incidents described in appellant's opening brief as illustrating the hostile treatment he received from Mignano are not supported by valid citations to the record. The remaining evidence includes Jackson's testimony that Mignano and Brown had not offered much help in response to his requests for assistance in the Menlo Park facility, and that Brown had told Jackson people in the regional office did not think he was the right person for the job. Raymond Mazon, Jackson's co-plaintiff, also testified that he heard Mignano tell another supervisor "Bart Jackson would not last three months [in his Menlo Park assignment] and that he would run right over him."

17 All further statutory references are to the Government Code unless otherwise indicated.

Jackson received the 12 weeks leave per year to which he was entitled by the statute. In fact, as he himself acknowledges, he received 23 weeks of CFRA leave between October 22, 1999, and March 31, 2000, because UPS policy required the use of the calendar year method of calculating the leave year for CFRA purposes. UPS designated his leave as a CFRA leave, and required him to use four of his five weeks of accrued vacation, as permitted by the statute. The court instructed the jury, however, over UPS's objection, that UPS could be in violation of the CFRA if it substituted Jackson's earned vacation benefits for paid leave.[18] UPS contends this instruction "grossly misstated the law and inevitably resulted in a finding for Jackson, because UPS concededly did substitute some of Jackson's vacation benefits for CFRA leave time that ran concurrently with otherwise-paid leave under UPS's [Income Protection Plan]."

The trial court denied UPS's motion for JNOV, finding the jury's CFRA award was based on the vacation-exhaustion issue, but concluding there was evidence UPS had not followed the same company policy in handling other managers who took disability leave.[19] While such a claim might give rise to a contractual cause of action, a theory neither pled nor litigated by Jackson here, it was insufficient to support a finding of liability under CFRA.[20] (See *Dolese v. Office Depot, Inc.* (5th Cir. 2000) 231 F.3d 202

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18 The jury was instructed that it could find a CFRA violation: (1) if Jackson requested a leave of absence due to his own serious health condition and the request was denied; (2) if UPS substituted his earned vacation benefits for paid leave, or (3) if, when Jackson returned from leave, UPS failed to return him to a substantially equivalent position. The court apparently changed the original language of the instruction from "unpaid leave" to "paid leave" after discussion with the parties. When the court read the revised instruction to the jury, Jackson's counsel interrupted to argue that the instruction should have referred to "unpaid leave," but was referred by the court to the previous discussion of the matter.

19 The court referred to evidence that some managers were allowed to take vacation after returning from a short-term disability leave.

20 The trial court recognized "a viable argument that an employee disability leave plan that is applied in an indiscriminate [*sic*] process may only violate common law principles and not offend the purposes of CFRA. Hopefully, where this line is, in light of cases like *Ragsdale* [*v. Wolverine Worldwide, Inc.* (8th Cir. 2000) 218 F.3d 933 (*Ragsdale*)] and *Strickland* [*v. Water Works and Sewer Board of the City of Birmingham* (11th Cir. 2001) 239 F.3d 1199], will soon be determined." The United States Supreme Court subsequently decided *Ragsdale* in favor of the employer, rejecting the employee's claim that she was owed more leave based on a technical violation of the FMLA's notice requirement. ((2002) 535 U.S. 81.)

[employer's contractual agreement to provide employees with more generous leave than mandated by FMLA did not create FMLA cause of action], citing *Covey v. Methodist Hosp. of Dyersburg, Inc.* (W.D. Tenn. 1999) 56 F.Supp.2d 965, 971-972, and *Rich v. Delta Air Lines, Inc.* (N.D.Ga. 1996) 921 F.Supp.767, 773; see also *Funkhouser v. Wells Fargo Bank* (9th Cir. 2002) 289 F.3d 1137, 1140-1141 [employer complies with FMLA as long as it meets or exceeds the statute's minimum requirements].) Even assuming arguendo that other managers received treatment more favorable than that required by the CFRA, it does not follow that Jackson's treatment, which was consistent with the requirements of the statute, violated the CFRA.

The case on which the trial court relied, *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1127-1129 (*Bachelder*), is distinguishable. The FMLA violation in that case was not based on the employer's inconsistent application of an FMLA policy or non-FMLA benefit as between the plaintiff and other workers. Instead, the plaintiff herself had been terminated without receiving the leave required by the statute.[21] (*Id*. at p. 1132.)

Jackson also contends UPS violated CFRA by applying the statute so as to deprive him of short-term disability benefits under the company's Income Protection Plan (IPP). He relies on section 12945.2, subdivision (f), which provides, in relevant part, that an employee taking CFRA leave "shall continue to be entitled to participate in . . . employee benefit plans, including life, short-term, or long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the extent and under the same conditions as apply to an unpaid leave taken for any purpose other than those described in subdivision (a)." Jackson contends the CFRA is more beneficial to employees in this regard than the FMLA, which contains no such provision. Jackson has not presented evidence, however, that UPS treated CFRA leaves less favorably than

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21 The employer in *Bachelder*, *supra*, argued that the employee had already used up her 12 weeks of FMLA leave, by calculating the leave year in a way never before published in an employee handbook or announced to employees, and that her medical absences were therefore unprotected by the statute. (259 F.3d at pp. 1121, 1129.) The evidence showed that UPS, by contrast, had adopted and published its method of calculating the leave year long before Jackson's leave began.

other unpaid leaves in this regard.[22] As Jackson also acknowledges, UPS's IPP provides disability benefits that are not payable when an employee receives vacation pay.[23] Nor does Jackson point to any provision in the IPP guaranteeing employees who are receiving salary continuation benefits under the plan the right to also retain their vacation benefits. Moreover, even assuming UPS had violated its own internal policy, no claim would have been stated under CFRA, which permits vacation depletion, as explained above.[24]

Jackson also claims UPS belatedly adopted the most unfavorable method of calculating his CFRA entitlement, thus denying him use of his accrued vacation when his disability benefits expired. Jackson complains that UPS did not personally inform him of its method of calculating his leave (in accordance with the calendar year, as he concedes is permitted by CFRA[25]) until almost one year after the leave began. UPS had designated its choice of the calendar year as the method of calculation of CFRA leaves, however, in its FMLA/CFRA policy published in 1995. Contrary to Jackson's argument, there was no violation here of the principle enunciated in *Bachelder*, *supra*, to the effect that the "initial selection of a method for calculating the leave year must be an open—not a secret—one before it can be applied to an employee's disadvantage." (259 F.3d at p. 1129.) Under these circumstances, UPS was not required to choose the method of calculating CFRA leave most favorable to Jackson.[26] (See also *Sarno v. Douglas*

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22 Instead, he contends that other managers within the protected group retained their vacation leave even though he did not. The case on which Jackson relies, *Hunt v. Rapides Healthcare System, LLC* (5th Cir. 2001) 277 F.3d 757, 765 (*Hunt*), is not on point, as it involved the consistent use of the method of calculating the CFRA leave year, which is not at issue here.

23 The IPP states: "No STD benefits are payable for days when you receive: [¶] discretionary days (sick pay, optional holiday pay) [¶] holiday pay [¶] vacation pay."

24 Nor was this theory pleaded in Jackson's complaint.

25 See 2 CCR 7297.3(b) (1995); 29 CFR 825.200(b).

26 Jackson acknowledges that under the calendar year method previously adopted by UPS, he received 23 weeks of CFRA leave during a period of slightly more than five months. He contends he also lost five weeks of accrued vacation and five weeks of salary, however, apparently on the theory that the result would have been different if a different method of calculation had been applied. We also note this theory was not presented to the jury.

Elliman-Gibbons & Ives, Inc. (2d Cir. 1999) 183 F.3d 155, 162 [no independent right to sue for failure to give notice under the FMLA].)

Jackson also argues UPS retaliated against him for taking CFRA leave. The jury, however, rejected his retaliation claim.[27] We also note that Jackson was reinstated to a job at the same level of pay and benefits, even though he did not return to work at the end of his CFRA leave and his statutory right to reinstatement had therefore expired. (See *Hunt*, *supra*, 277 F.3d at p. 763.) Because Jackson failed to show a violation of his rights under the CFRA, the judgment in his favor on that cause of action must be reversed.[28]

DISPOSITION

The judgment for UPS is affirmed. The judgment for Jackson on the CFRA claim is reversed. Each party to bear their own costs.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.

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27 The jury gave a negative answer to the following question: "Has plaintiff proved that he has been retaliated against by defendant because of plaintiff's association with an age discrimination lawsuit in which two other employees alleged age discrimination and/or because plaintiff protested his CFRA claims?"

28 We therefore need not address Jackson's argument that the trial court abused its discretion in denying him costs and attorney fees on his CFRA claim.